1879

Returned 11-181 Field

Submitted Jan. 22, 1880

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 873.

THE PEOPLE'S BANK OF BELLEVILLE, PLAINTIFF IN ERROR,

vs.

THE MANUFACTURERS' NATIONAL BANK OF CHICAGO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

**FILED OCTOBER 2, 1879.**

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## No. 873.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Friday the eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and fourth year.

WILLIAM H. BRADLEY, *Clerk.*

THE PEOPLE'S BANK OF BELLEVILLE
*vs.*
THE MANUFACTURERS' NATIONAL BANK OF Chicago. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the 22d day of February, A. D. 1877, came the said defendant, The Manufacturers' National Bank of Chicago, by Messrs. Gardner and Schuyler, its attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, its bond for costs, and at the same time filed in said clerk's office a transcript of the record
2 of the proceedings had in the superior court of Cook County, in the State of Illinois, in said entitled cause, which said bond and transcript of record are respectively in the words and figures following, to wit:

*Bond for costs.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

Circuit court, March term, A. D. 1877.

PEOPLE'S BANK OF BELLEVILLE
*vs.*
MANUFACTURERS' NATIONAL BANK. } In assumpsit.

I enter myself as security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the defendant of any costs ordered or adjudged to be paid by it, I hereby agree and stipulate that execution may issue against my property for any costs taxed against it.

Dated this 22d day of February, A. D. 1877.

GEO. GARDNER.

(Endorsed:) Filed Feb. 22, A. D. 1877. Wm. H. Bradley, clerk.

*Transcript of record of proceedings in the superior court of Cook County, in the State of Illinois.*

UNITED STATES OF AMERICA,
3 STATE OF ILLINOIS, *County of Cook, ss:*

Pleas before the honorable Joseph E. Gary, one of the judges of the superior court of Cook County, in the State of Illinois, holding a branch court of said court on the 2d day of January, A. D. 1877, at a

regular term of said superior court of Cook County begun and holden at the court-house in the city of Chicago, in said county and State, on the first Monday, being the first day, of January, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of of the United States of America the one hundred and first.

Present, the honorable Joseph E. Gary, judge of the superior court of Cook County; Luther Laflin Mills, prosecuting attorney; Charles Kern, sheriff of Cook County.

Attest:

JOHN J. HEALY, *Clerk.*

Be it remembered that heretofore, to wit, on the twentieth day of October, in the year of our Lord one thousand eight hundred and seventy-six, The People's Bank of Belleville, plaintiff, by George W. Smith and C. W. Thomas, its attorneys, filed in the office of the clerk of the superior court of Cook County its præcipe for summons and its
4 declaration, which are in the words and figures as follows, to wit:

*Præcipe for summons.*

STATE OF ILLINOIS,
*Cook County, ss:*

Superior court of Cook County, to the November term, A. D. 1876.

| | |
|---|---|
| PEOPLE'S BANK OF BELLEVILLE, PLAINTIFF, v. MANUFACTURERS' NATIONAL BANK OF CHICAGO, defendant. | Assumpsit. Damages $80,000.00. |

The clerk of the said court will issue a summons in the above entitled cause to said defendant in a plea of trespass on the case on promises, to the damage of said plaintiff in the sum of eighty thousand dollars; direct the same to the sheriff of Cook County to execute, and make it returnable to the November term of said court, A. D. 1876.

Chicago, October 20th, 1876.

GEO. W. SMITH,
*Plaintiff's Attorney.*

To JOHN J. HEALY, Esq., *Clerk.*

*Declaration.*

STATE OF ILLINOIS,
*County of Cook, ss:*

In the superior court of Cook County, to the November term, 1876.

5 The People's Bank of Belleville, plaintiff, complains of The Manufacturers' National Bank of Chicago, defendant, of a plea of trespass on the case on promises:

For that whereas on the 5th day of August, A. D. 1873, at Chicago, to wit, at the county of Cook, in the State of Illinois, one Henry E. Picket made his promissory note in writing, bearing date the day and year aforesaid, by him subscribed, and thereby promised to pay, for value received, to his own order, one year after said date, five thousand dollars, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with interest at ten

per cent. per annum after maturity, and endorsed the same by writing his name upon the back thereof. And whereas, on the same day and year aforesaid, and before plaintiff received said note as hereinafter mentioned, and before said note was put in circulation by said Picket, the defendant, at the county aforesaid, in consideration that the plaintiff would accept and receive of the said Picket the said note by its endorsement in writing on the back of said note, signed by it, the defendant, by the name and style of M. D. Buchanan, vice-pres't Man'f's' Nat'l Bank of Chicago, guaranteed the payment of the said sum of money, with interest at the maturity of the said note, and promised the
6 plaintiff to pay it the same with interest, as specified in said note, according to the tenor and effect thereof, if the said Picket should not so pay the same. And the plaintiff avers that thereupon it, confiding in the said undertaking of the defendant, then and there accepted and received of the said Picket the note aforesaid, and that although the day of payment in the said note specified has elapsed, the said Picket did not, nor would on that day or at any other time, pay to the plaintiff the amount of the said note, or interest, or any part thereof, but refuses so to do; whereof the defendant on the day last aforesaid had notice.

And whereas, also, one Henry E. Picket, on the fifth day of August, A. D. 1873, at Chicago, to wit, at the county of Cook, in the State of Illinois, made his other promissory note in writing, bearing date the day and year aforesaid, by him subscribed, and thereby promised to pay, for value received, to his own order, one year after said date, five thousand dollars, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with interest at ten per cent. per annum after maturity, and endorsed the same by writing his name upon the back thereof. And whereas, on the day and year aforesaid, and before plaintiff received said note as hereinafter
7 mentioned, and before said note was put in circulation by said Picket, the defendant, at the county aforesaid, in consideration that the plaintiff would accept and receive of the said Picket, the said note by its endorsement in writing on the back of said note, signed by it, the defendant, by the name and style of M. D. Buchanan, vice-pres't Manf. Nat'l Bank of Chicago, guaranteed the payment of the said sum of money, with interest at the maturity of the said note, and promised the plaintiff to pay it the same with interest, as specified in said note, and according to the tenor and effect thereof, if the said Picket should not so pay the same.

And the plaintiff avers that thereupon it, confiding in the said undertaking of the defendant, then and there accepted and received of the said Picket the note aforesaid, and that although the day of payment in the said note specified has elapsed, the said Picket did not, nor would on that day or at any other time, pay to the plaintiff the amount of the said note, or interest, or any part thereof, but refuses so to do, whereof the defendant on the day last aforesaid had notice.

And whereas, also, one Henry E. Picket, on the 5th day of August, A. D. 1873, at Chicago, to wit, at the county of Cook, in the State of Illinois, made his other promissory note in writing, bearing date
8 the day and year aforesaid, by him subscribed, and thereby promised to pay, for value received, to his own order, one year after said date, five thousand dollars, at the Manufacturers' Nat. Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with interest at ten per cent. per annum after maturity, and endorsed the same by writing his name upon the back thereof. And whereas, on the day and year aforesaid, and before plaintiff received said note as

hereinafter mentioned, and before said note was put in circulation by said Picket, the defendant, at the county aforesaid, in consideration that the plaintiff would accept and receive of the said Picket the said note by its endorsement in writing on the back of said note, signed by it, the defendant, by the name and style of M. D. Buchanan, vice-pres't Man'f's' Nat'l Bank of Chicago, guaranteed the payment of the said sum of money, with interest at the maturity of the said note, and promised the plaintiff to pay it the same with interest, as specified in said note, and according to the tenor and effect thereof, if the said Picket should not so pay the same.

And the plaintiff avers that thereupon it, confiding in the said undertaking of the defendant, then and there accepted and received of the said Picket the note aforesaid, and that although the day of pay-
9 ment in the said note specified has elapsed, the said Picket did not, nor would on that day or at any other time, pay to the plaintiff the amount of the said note, or interest, or any part thereof, but refuses so to do, whereof the defendant on the day last aforesaid had notice.

And whereas also the said Henry E. Picket, on the 5th day of August, A. D. 1873, at Chicago, to wit, at the county of Cook, in the State of Illinois, made his other promissory note in writing, bearing date the day and year aforesaid, by him subscribed, and thereby promised to pay, for value received, to his own order, one year after said date, five thousand dollars, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with interest at ten per cent. per annum after maturity, and endorsed the same by writing his name on the back thereof.

And whereas on the day and year aforesaid, and before plaintiff received said note as hereinafter mentioned, and before said note was put in circulation by said Picket, the defendant, at the county aforesaid, in consideration that the plaintiff would accept and receive of the said Picket the said note, by its endorsement in writing on the back of said note, signed by the defendant, by the name and style of M. D. Buchanan, vice-pres't, Man'f's' Nat'l Bank of Chicago, guaranteed
10 the payment of the said sum of money, with interest at the maturity of the said note, and promised the plaintiff to pay it the same with interest, as specified in said note and according to the tenor and effect thereof, if the said Picket should not so pay the same. And the plaintiff avers that thereupon it, confiding in the said undertaking of the defendant, then and there accepted and received of the said Picket the note aforesaid, and that although the day of payment in the said note specified has elapsed, the said Picket did not, nor would on that day or at any other time, pay to the plaintiff the amount of said note or interest or any part thereof, but refuses so to do, whereof the defendant on the day last aforesaid had notice.

And whereas also the said Henry E. Picket, on the 5th day of August, A. D. 1873, at Chicago, to wit, at the county of Cook, in the State of Illinois, made his other promissory note in writing, bearing date the day and year aforesaid, by him subscribed, and thereby promised to pay, for value received, to his own order, one year after said date, five thousand dollars at The Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum payable semi-annually, and with interest at ten per cent per annum after maturity, and endorsed the same by writing his name upon the back thereof.

11 And whereas on the day and year aforesaid and before plaintiff received said note as hereinafter mentioned, and before said

note was put in circulation by said Picket, the defendant, at the county aforesaid, in consideration that the plaintiff would accept and receive of the said Picket the said note, by its endorsement in writing on the back of said note, signed by it, the defendant, by the name and style of M. D. Buchanan, vice-pres't Man'f's' Nat'l Bank of Chicago, guaranteed the payment of the said sum of money with interest at the maturity of the said note, and promised the plaintiff to pay it the same with interest, as specified in said note and according to the tenor and effect thereof, if the said Picket should not so pay the same. And the plaintiff avers that thereupon it, confiding in the said undertaking of the defendant, then and there accepted and received of the said Picket the note aforesaid, and that although the day of payment in the said note specified has elapsed, the said Picket did not, nor would on that day or at any other time, pay to the plaintiffs the amount of the said note or interest or any part thereof, but refuses so to do, whereof the defendant on the day last aforesaid had notice.

And whereas also the said Henry E. Picket, on the 5th day of
12 August, A. D. 1873, at Chicago, to wit, at the county of Cook, in the State of Illinois, made his other promissory note in writing, bearing date the day and year aforesaid, by him subscribed, and thereby promised to pay, for value received, to his own order, one year after said date, five thousand dollars, at the Manufacturers' Nat. B'k of Chicago, to wit, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum payable semi-annually, and with interest at ten per cent. per annum after maturity, and endorsed the same by writing his name on the back thereof.

And whereas on the day and year aforesaid, and before plaintiff received said note as hereinafter mentioned, and before said note was put in circulation by said Picket, the defendant, at the county aforesaid, in consideration that the plaintiff would accept and receive of the said Picket the said note, by its endorsement in writing on the back of said note, signed by it, the defendant, by the name and style of M. D. Buchanan, vice pres't Man'f's' Nat'l Bank of Chicago, guaranteed the payment of the said sum of money, with interest at the maturity of the said note, and promised the plaintiff to pay it the same with interest as specified in said note and according to the tenor and effect thereof, if the said Picket should not so pay the same. And
13 the plaintiff avers that thereupon it, confiding in the said undertaking of the defendant, then and there accepted and received of the said Picket the note aforesaid, and although the day of payment in the said note specified has elapsed, the said Picket did not, nor would on that day or at any other time, pay to the plaintiff the amount of the said note or interest or any part thereof, but refuses so to do, whereof the defendant on the day last aforesaid had notice.

And whereas also the said Henry E. Picket, on the 5th day of August, A. D. 1873, at Chicago, to wit, at the county of Cook, in the State of Illinois, made his other promissory note in writing, bearing date the day and year aforesaid, by him subscribed, and thereby promised to pay, for value received, to his own order, one year after said date, five thousand dollars, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with interest at ten per cent. per annum after maturity, and endorsed the same by writing his name on the back thereof; and whereas on the day and year aforesaid, and before plaintiff received said note, as hereinafter mentioned, and before said note was put in circulation by said Picket, the defendant, at the county aforesaid, in consideration that the

plaintiff would accept and receive of the said Picket the said note
14 by its endorsement in writing on the back of said note, signed by it, the defendant, by the name and style of M. D. Buchanan, vice-pres't Man'f's' Nat'l Bank of Chicago, guaranteed the payment of the said sum of money, with interest, at the maturity of the said note, and promised the plaintiff to pay it the same with interest, as specified in said note, according to the tenor and effect thereof, if the said Picket should not so pay the same; and the plaintiff avers that thereupon it, confiding in the said undertaking of the defendant, then and there accepted and received of the said Picket the note aforesaid; and although the day of payment in the said note specified has elapsed, the said Picket did not, nor would at that day or at any other time, pay to the plaintiff the amount of the said note or interest, or any part thereof, but refuses so to do, whereof the defendant on the day last aforesaid had notice.

And whereas also the said Henry E. Picket, on the 5th day of August, A. D. 1873, at Chicago, to wit, at the county of Cook, in the State of Illinois, made his other promissory note in writing, bearing date the day and year aforesaid, by him subscribed, and thereby promised to pay, for value received, to his own order, one year after said date, five thou-
sand dollars, at the Manufacturers' National Bank of Chicago,
15 with interest, at ten per cent. per annum, payable semi-annually, and with interest at ten per cent. per annum after maturity, and endorsed the same by writing his name upon the back thereof; and whereas, on the day and year aforesaid, and before plaintiff received said note, as hereinafter mentioned, and before said note was put in circulation by said Picket, the defendant, at the county aforesaid, in consideration that the plaintiff would accept and receive of the said Picket the said note, by its endorsement in writing on the back of said note, signed by it, the defendant, by the name and style of M. Buchanan, vice-pres't Man'f's' Nat'l Bank of Chicago, guaranteed the payment of the said sum of money, with interest, at the maturity of the said note, and promised the plaintiff to pay it the same with interest, as specified in said note, and according to the tenor and effect thereof, if the said Picket should not so pay the same; and the plaintiff avers that thereupon it, confiding in the said undertaking of the defendant, then and there accepted and received of the said Picket the note aforesaid, and although the day of payment in the said note specified has elapsed, the said Picket did not, nor would on that day or at any other time, pay to the plaintiff the amount of the said note or interest, or any part thereof, but refuses so to do, whereof the defendant on the day last aforesaid had notice.

16 And whereas also the said Henry E. Picket, on the 5th day of August, A. D. 1873, at Chicago, to wit, at the county of Cook and State of Illinois, made his eight other promissory notes in writing, each bearing date the day and year aforesaid, by each of which said notes the said Picket promised to pay to his own order the sum of five thousand dollars, at the Manufacturers' National Bank of Chicago, to wit, at the county aforesaid, with interest thereon from said date until maturity, at the rate of ten per cent. per annum, payable semi-annually, and with interest from maturity at the rate of ten per cent. per annum; and plaintiff avers that the said Picket, on the day and year aforesaid, in order to make said notes negotiable, endorsed each of the same on the back with his name, and delivered all of said notes to the defendant to negotiate, and for no other consideration and purpose whatever; and that the defendant, in consideration that the plaintiff would accept and receive said notes of the said Picket, guaranteed in writing the prompt

payment by said Picket of the principal sum and interest of said notes at their maturity, and promised plaintiff to pay it the said sums of money in said notes severally mentioned, with interest, according to the tenor and effect of said notes severally, if the said Picket should not so pay the same; and plaintiff avers that it, confiding in the said under-
17 taking of said defendant, accepted and received the said notes of the said Picket, and that although the day of payment in the said notes specified has elapsed, the said Picket did not, nor would on that day or at any other time, pay to the plaintiff the amount of said notes with interest, or the amount of any of the said notes with interest, or any part thereof, but refuses so to do, whereof the defendant on the day last aforesaid had notice.

And whereas also the said Henry E. Picket, on the 5th day of August, A. D. 1873, at Chicago, to wit, at the county of Cook, and State of Illinois, made his eight other promissory notes in writing, each bearing date the day and year aforesaid by each of which said notes the said Picket promised to pay to his own order, for value received, the sum of five thousand dollars, at the Manufacturers' National Bank of Chicago, to wit, at the county aforesaid, with interest thereon until maturity at the rate of ten per cent. per annum, payable semi-annually, and with interest after maturity at the rate of ten per cent. per annum.

And plaintiff avers that the said Picket, on the day and year aforesaid, endorsed each of said notes on the back with these words,
18 to wit, "Pay to the order of The People's Bank of Belleville," and signed the said endorsement with his name, and delivered said notes to the defendant, and that the defendant, in consideration that the plaintiff would accept and receive said notes of the said Picket, guaranteed in writing the prompt payment by said Picket of the principal sum and interest of said notes at their maturity, and promised plaintiff to pay it the said sums of money in said notes severally mentioned, with interest, according to the tenor and effect of said note severally if the said Picket should not so pay the same; and plaintiff avers that it, confiding in the said undertaking of said defendant, accepted and received the said notes of the said Picket, and that although the day of payment in the said note specified has elapsed, the said Picket did not, nor would on that day or at any other time, pay to the plaintiff the amount of said notes, with interest, or the amount of any of said notes, with interest, or any part thereof, but refuses so to do, whereof the defendant, on the day last aforesaid, had notice, by means whereof the defendant then and there became liable to pay to the said plaintiff the said several sums of money in the several counts above mentioned when it, the said defendant, should be thereunto afterwards requested; and being so liable it, the said defend-
ant, in consideration thereof, aftewards, to wit, on the day and
19 year last aforesaid, at the county aforesaid, undertook, and then and there promised the said plaintiff to pay it the said sums of money when it, the said defendant, should be thereunto afterwards requested, and yet the defendant, although requested, has not paid the plaintiff the said several sums of money or any of them or any part thereof, to the damage of plaintiff of eighty thousand dollars; wherefore it brings suit, &c.

GEO. W. SMITH,
AND C. W. THOMAS,
*Pl'ffs' Attorneys.*

*Copies of instrument sued on.*

$5,000.00] CHICAGO, *August 5th*, 1873.

One year after date I promise to pay to the order of myself five thousand dollars at The Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with ten per cent. per annum interest after maturity, value received.

HENRY E. PICKET.

Due . This note is secured by trust-deed.

(Endorsed as follows:)
Pay to the order of the People's Bank of Belleville.

HENRY E. PICKET.

This bank hereby guarantees the payment of this note, principal and interest, at maturity.

M. D. BUCHANAN,
*Vice-Pres't Man'f' Nat'l Bank of Chicago.*

(On the margin:) Henry E. Picket, broker and real estate dealer.

20 $5,000.00.] CHICAGO, *August 5th*, 1873.

One year after date I promise to pay to the order of myself five thousand dollars, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with ten per cent. per annum interest after maturity, value received.

HENRY E. PICKET.

Due . This note is secured by trust-deed.

(Endorsed as follows:)
Pay to the order of the People's Bank of Belleville.

HENRY E. PICKET.

This bank hereby guarantees the payment of this note, principal and interest, at maturity.

M. D. BUCHANAN,
*Vice-Pres't Man'f' Nat'l Bank of Chicago.*

(On the margin:) Henry E. Picket, broker and real estate dealer.

$5,000.00.] CHICAGO, *August 5th*, 1873.

One year after date I promise to pay to the order of myself five thousand dollars, at the Manufacturers' Nat. Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with ten per cent. per annum after maturity, value received.

HENRY E. PICKET.

Due . This note is secured by trust-deed.

(Endorsed as follows:)
Pay to the order of the People's Bank of Belleville.

HENRY E. PICKET.

This bank hereby guarantees the payment of this note, principal and interest, at maturity.

M. D. BUCHANAN,
*Vice-Pres't Man'f' Nat'l Bank of Chicago.*

(On the margin:) Henry E. Picket, broker and real estate dealer.

21 $5,000.00] CHICAGO, *August 5th*, 1873.

One year after date I promise to pay to the order of myself five thousand dollars, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with ten per cent. per annum interest after maturity, value received.

HENRY E. PICKET.

Due . This note is secured by trust-deed.

(Endorsed as follows:)
Paid to the order of the People's Bank of Belleville.

HENRY E. PICKET.

This bank hereby guarantees the payment of this note, principal and interest, at maturity.

M. D. BUCHANAN,
*Vice-Pres't Man'f' Nat'l Bank of Chicago.*

(On the margin:) Henry E. Picket, broker and real estate dealer.

$5,000.00.] CHICAGO, *August 5th*, 1873.

One year after date I promise to pay to the order of myself five thousand dollars, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with ten per cent. interest after maturity, value received.

HENRY E. PICKET.

Due . This note secured by trust-deed.
(Endorsed as follows:)
Pay to the order of the People's Bank of Belleville.

HENRY E. PICKET.

This bank hereby guarantees the payment of this note, principal and interest, at maturity.

22 M. D. BUCHANAN,
*Vice-Pres't Man'f' Nat'l Bank of Chicago.*

(On the margin:) Henry E. Picket, broker and real estate dealer.

$5,000.00.] CHICAGO, *Aug. 5th*, 1873.

One year after date I promise to pay to the order of myself five thousand dollars, at the Manufacturers' Nat. B'k of Chicago, with interest at 10 per cent. per annum, payable semi-annually, and with ten per cent. per annum interest after maturity, value received.

HENRY E. PICKET.

Due . This note is secured by trust-deed.

(Endorsed as follows:)
Pay to the order of the People's Bank of Belleville.

HENRY E. PICKET.

This bank hereby guarantees the payment of this note, principal and interest, at maturity.

M. D. BUCHANAN,
*Vice-Pres't Man'f' Nat'l Bank of Chicago.*

(On the margin:) Henry E. Picket, broker and real estate dealer.

$5,000.00.] CHICAGO, *August 5th*, 1873.

One year after date I promise to pay to the order of myself five thou-

sand dollars, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with ten per cent. per annum after maturity, value received.

HENRY E. PICKET.

Due . This note is secured by trust-deed.

(Endorsed as follows:)
Pay to the order of the People's Bank of Belleville.

HENRY E. PICKET.

23 This bank hereby guarantees the payment of this note, principal and interest, at maturity.

M. D. BUCHANAN,
*Vice-Pres't Man'f' Nat'l Bank of Chicago.*

(On the margin:) Henry E. Picket, broker and real estate dealer.

$5,000.00.] CHICAGO, *August 5th*, 1873.

One year after date I promise to pay to the order of myself five thousand dollars, at the Manufacturers' National Bank of Chicago, with interest at ten per cent. per annum, payable semi-annually, and with ten per cent. per annum interest after maturity, value received.

HENRY E. PICKET.

Due . This note is secured by trust deed.
(Endorsed as follows:)
Pay to the order of the People's Bank of Belleville.

HENRY E. PICKET.

This bank hereby guarantees the payment of this note, principal and interest, at maturity.

M. D. BUCHANAN,
*Vice-Pres't Man'f' Nat'l Bank of Chicago.*

(On the margin:) Henry E. Picket, broker and real estate dealer.

CHICAGO, *Aug. 8th*, 1873.

A. G. BADGLEY, Esq., *Cashier:*

In accordance with your telegram of this date, I herewith hand you ten notes of $5,000 each, Henry E. Picket, dated 5th August, 1873, ten per cent. semi-annually—$50,000. We debit your account $50,-
24 000. This bank hereby guarantees the prompt payment of the principal sum and interest at maturity of said notes. The trust deed securing said notes has been filed for record and as soon as recorded I will forward same to you. Please return to me note of Sherman $15,000 enclosed in our letter of 6th inst., and we will credit same on your account.

M. D. BUCHANAN.
*Vice-Pres't.*

STATE OF ILLINOIS,
*Cook County, ss:*

In the superior court of Cook County. To the November term, 1876.

THE PEOPLE'S BANK OF BELLEVILLE
*vs.*
THE MANUFACTURERS' NATIONAL BANK OF Chicago. } Assumpsit.

STATE OF ILLINOIS,
*St. Clair County, ss:*

Albert G. Badgley, being first duly sworn, says upon his oath that he is and, for more than three years last past, has been cashier of the plaintiff; that the demand of the plaintiff in the above-entitled cause is upon and on account of defendant's written guaranty of eight promissory notes, all executed by one Henry E. Picket, all dated Chicago, August 5th, 1873, all payable one year after said date to the order of said Picket, and all endorsed by him, all bearing interest at ten per cent. per
25 annum, payable semi-annually, and interest at a like rate after maturity, all payable at the Manufacturers' National Bank at Chicago, and each for the sum of five thousand dollars, a copy of which notes and guaranty are filed with the declaration in said cause, and that there is due said plaintiff from the defendant, after allowing to it, the defendant, all just credits, deductions, and set offs the sum of forty thousand dollars, with interest thereon at the rate of ten per cent. per annum, from the 5th day of August, A D. 1873.

ALBERT G. BADGLEY.

Subscribed and sworn to before me this ninth day of October, A. D. 1876.

[SEAL.] CHARLES W. THOMAS,
*Notary Public.*

And on the day and year last aforesaid, to wit, October 20th A. D. 1876, there issued out of the office of the clerk of said court the people's writ of summons, which said writ, with the returns of the sheriff thereon endorsed, is in words and figures as follows:

STATE OF ILLINOIS,
*Cook County, ss:*

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon Manufacturers' National
26 Bank of Chicago if it shall be found in your county personally to be and appear before the supreme court of Cook County, on the first day of the term thereof, to be holden at the court-house, in Chicago, in said Cook County, on the first Monday of November next, to answer unto The People's Bank of Belleville in a plea of trespass on the case upon promises, to damage of said plaintiff, as it is said in the sum of eighty thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness John J. Healy, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 20th day of October, A. D. 1876.

JNO. J. HEALY, *Clerk.*

(Endorsed:)
Served the within writ on the within-named Manufacturers' National Bank of Chicago by delivering a copy thereof to Ira Holmes, president of said bank, this 20th day of October, 1876.

FRANCIS AGNEW, *Sheriff*,
By WILLIAM FOGARTY, *Deputy*.

And afterwards, to wit, on the sixth day of November, in the year last aforesaid, to wit, A. D. 1876, The Manufacturers' National
27 Bank, defendant, by Gardner and Schuyler, its attorneys, filed in the office of the clerk of said court its plea and affidavit of merits, which are in the words and figures as follows, to wit:

STATE OF ILLINOIS,
*Cook County, ss:*

In the superior court of said county of the November term, 1876.

MANUFACTURERS' NATIONAL BANK } Assumpsit.
*ats.*
PEOPLE'S BANK OF BELLEVILLE. }

And the said defendant, by Gardner and Schuyler, its attorneys, comes and defends the wrong and injury when, &c., and says that it did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country, &c.

And for a further plea in this behalf the said defendant comes and defends the wrong and injury, when, &c., and says that the said several supposed guaranties in the said declaration mentioned are not nor ever were the guaranties of the said defendant, and of this it puts itself upon the country, &c.

GARDNER AND SCHUYLER,
*Def'ts Att'ys.*

STATE OF ILLINOIS,
*Cook County, ss:*

Joel D. Harvey, being duly sworn, deposes and says that on the 26th day of February, 1875, by the order and decree of the United
28 States circuit court of the northern district of Illinois, he was duly appointed receiver of the Manufacturers' National Bank, the defendant named in the above-entitled suit, and that he is still acting as such receiver; that he has read the foregoing pleas, and knows the contents thereof, and that the same are true in substance and in fact.

JOEL D. HARVEY.

Subscribed and sworn to before me this day of November, A. D, 1876.

[SEAL.] O. R. GLOVER,
*Notary Public.*

STATE OF ILLINOIS,
*Cook County, ss:*

In the superior court of said county.

PEOPLE'S BANK OF BELLEVILLE, } Assumpsit.
*vs.*
MANUFACTURERS' NATIONAL BANK. }

Joel D. Harvey, being duly sworn, upon oath says that he is the re-

ceiver duly appointed by the circuit court of the United States for the northern district of Illinois of the above-named defendant, and that he verily believes the said defendant has a good defence to said suit upon the merits to the whole of the said plaintiff's demand.

JOEL D. HARVEY.

Subscribed and sworn to before me this day of November, 1876.
[SEAL.] O. R. GLOVER,
*Notary Public.*

And afterwards, to wit, on the thirty-first day of January, in
29 the year of our Lord one thousand eight hundred and seventy-seven, the defendant, by its attorneys aforesaid, filed in the office of the clerk of said court its petition, affidavit, and bond (to remove said cause to the circuit court of the United States for the northern district of Illinois), which are in the words and figures as follows, to wit:

*Petition.*

STATE OF ILLINOIS,
*Cook County, ss:*

In the superior court of said county, of the January term, 1877.

PEOPLE'S BANK OF BELLEVILLE
*vs.*
MANUFACTURERS' NATIONAL BANK. } Assumpsit.

Honorable the judges of the superior court of Cook County, Illinois:

The petition of Joel D. Harvey respectfully shows that he is informed and believes that the above-named plaintiff is a corporation, duly organized under and by virtue of the laws of the State of Illinois, and brings the above-entitled suit as such corporation.

Your petitioner further shows that the above-named defendant is a corporation duly organized at Chicago, in said county, under and by virtue of title 52 of the laws of the United States of America and the amendments thereto, the said title 52 being an act of Congress of
30 said United States to provide for the creation and organization of national banks, and specifying the powers of corporations organized thereunder.

And your petitioner further shows that on or about the 26th day of February, 1875, in a certain action theretofore pending in the circuit court of the United States for the northern district of Illinois, wherein James Irons was complainant and the said Manufacturers' National Bank and others were defendants, your petitioner was, by an order of said court, duly entered in said cause, duly appointed the receiver of said Manufacturers' National Bank; that immediately thereupon your petitioner duly qualified as such receiver, and entered upon the performance of his duties, and has ever since continued to act as such receiver.

And your petitioner further shows that the suit hereinabove entitled was commenced in this court on the 20th day of October, 1876, and that on the 6th day of November, 1876, your petitioner filed pleas in bar in said cause in behalf of the said defendant.

Petitioner also represents and shows that the said suit is brought upon the alleged guaranties of said bank of eight notes of $5,000 each, now alleged to be owned by said plaintiffs, and that your petitioner,

31 for one ground of defence to said suit, has pleaded in said suit, and claimed the fact to be that the alleged guaranties sued upon were not and are not the guaranties of the said Manufacturers' National Bank; and your petitioner further shows that the said suit is one arising under the laws of the United States, and that the gist of the action depends upon the construction of the said act, under which the said defendant was organized as aforesaid, and that the amount involved in said cause exceeds the sum of forty thousand dollars.

And your petitioner further shows that the said suit has never been placed upon the trial docket of this court, and that said suit could not have been, and cannot now be, tried before the next term of this court.

Wherefore your petitioner prays that in pursuance of the laws of the United States in such case provided, the said suit may be removed into the circuit court of the United States for the northern district of Illinois, and that an order of court be entered herein to that effect.

And your petitioner presents now here his bond in the penal sum of five thousand dollars, with Daniel J. Schuyler as his surety, conditioned that your petitioner will enter in said United States circuit court,

32 on or before the first day of the next term thereof, a copy of the record in this suit, and pay all costs that may be awarded by said circuit court if such court shall hold that the said suit was improperly removed thereto, or wrongfully removed thereto, and also that he will there appear and enter special bail in said suit if special bail was originally requisite therein; which said bond your petitioner prays may be approved by the court. And your petitioner will ever pray, &c.

JOEL D. HARVEY,
*Receiver.*

GARDNER AND SCHUYLER,
*Att'ys for Pet'r.*

*Affidavit.*

STATE OF ILLINOIS,
*Cook County, ss:*

Joel D. Harvey, being duly sworn, deposes and says that he is the petitioner named in, and who signed, the foregoing petition; that he has read the said petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be upon information and belief; and as to those matters, he believes them to be true.

JOEL D. HARVEY.

Subscribed and sworn to before me this 30th day of January, 1877.
[SEAL.] JOHN A. HINCKLEY,
*Notary Public.*

33 *Bond.*

Know all men by these presents that we, Joel D. Harvey, receiver of the Manufacturers' National Bank, and Daniel J. Schuyler are held and firmly bound unto the People's Bank of Belleville, in the penal sum of five thousand dollars, for the payment of which sum, well and truly to be made unto the said People's Bank of Belleville, its successors or assigns, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this twenty-seventh day of January, 1877.

The condition of this obligation is such that, whereas, the said obligor, Joel D. Harvey, as receiver of said Manufacturers' National Bank, has filed a petition in a certain cause now pending undetermined in the superior court of Cook County, Illinois, wherein said above-named obligee is plaintiff, and said Manufacturers' National Bank is defendant, praying for the removal of said cause to the circuit court of the United States for the northern district of Illinois:

Now, therefore, if after the granting of such order of removal of said suit to the said circuit court of the United States for the northern
34 district of Illinois, in pursuance of the prayer of said petition, the said Joel D. Harvey shall enter in said circuit court on or before the first day of the next succeeding term therof a copy of the records in said suit, and shall well and truly pay all costs that may be awarded by said circuit court if said court shall hold that said cause was improperly removed thereto, and shall also appear in said circuit court and enter special bail in said suit if special bail was originally requisite therein, then this obligation shall be void, else to remain in full force and virtue.

JOEL D. HARVEY. [SEAL.]
DANIEL J. SCHUYLER. [SEAL.]

Subscribed and acknowledged before me this day of January, 1877.

STATE OF ILLINOIS,
*Cook County, ss:*

, being duly sworn, upon oath says that he is the surety named in the foregoing bond, that he is a resident and freeholder of said county, and is worth the sum of ten thousand dollars over and above all his liabilities.

Subscribed and sworn to before me this day of January, 1877.

And on the day and year last aforesaid, to wit, January 31,
35 A. D. 1877, the same being one of the days of the January term of said court, the following among other proceedings were had in said court and entered of record, to wit:

PEOPLE'S BANK OF BELLEVILLE
*vs.*
MANUFACTURERS' NANTIOAL BANK OF CHICAGO. } 1368, 164327. Assumpsit.

This day comes the defendant by Gardner and Schuyler, its attorneys, and files herein the petition based on affidavit to remove this cause to the United States circuit court in and for the northern district of Illinois, and it appearing to the court that the said defendant has filed its bond conditioned according to the act of Congress in such case made and provided, and that the due notice of the defendant's application herein has been had on the plaintiff's attorney: On motion of the defendant, it is ordered that said cause be and the same is hereby transferred to the said United States circuit court, and that the clerk of this court do forthwith transmit to said United States circuit court a full transcript of all papers and pleadings on file herein, together with all orders made and entered of record herein.

STATE OF ILLINOIS,
*Cook County, ss:*

36 I, John J. Healy, clerk of the superior court of Cook County, within and for the State of Illinois, do hereby certify that the above and foregoing is a full, true, and complete transcript of all papers and pleadings now on file in my office and of all orders made and entered of record in said court in a certain cause lately pending in said court on the common law side thereof wherein the People's Bank of Belleville was plaintiff, and the Manufacturers' National Bank of Chicago, defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Chicago this 6th day of February, A. D. 1877.

[SEAL.] JNO. J. HEALY, *Clerk.*

(Endorsed:) Filed Feb. 22, 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 1st day of June, A. D. 1877, said plaintiff, by its attorneys, filed in said clerk's office its additional counts to its said declaration filed in said entitled cause, which said additional counts are in the words and figures following, to wit:

*Additional counts to declaration.*

37 United States circuit court May term, 1877.

PEOPLE'S BANK OF BELLEVILLE
*v.*
MANUFACTURERS' NATIONAL BANK OF CHICAGO.

Additional counts.

And for that whereas the defendant on the 8th day of August, A. D. 1874, at the county of Cook and State of Illinois aforesaid, was indebted to the plaintiff in the sum of eighty thousand dollars, for money before that time lent by the plaintiff to the defendant at defendant's request; and in a like sum for money before that time paid and expended by the plaintiff for the use of the defendant at defendant's request; and in a like sum for money before that time received by the defendant for the use of the plaintiff; and in the like sum for interest on divers sums of money before that time forborne by the plaintiff to the defendant at its request, for divers spaces of time before then elapsed; and being so indebted the defendant, in consideration thereof, then and there promised the plaintiff to pay it, on request, the several sums of money due it as aforesaid, but the defendant, though requested, has not paid the same or either of them or any part thereof to the plaintiff, but refuses so to do.

38 G. W. SMITH AND C. W. THOMAS,
*For Pl'ff.*

COPY OF ACCOUNT SUED ON.

*Manufacturers' National Bank of Chicago to The People's Bank of Belleville, Dr.*

| | |
|---|---|
| To money lent | $80,000 |
| To money paid and expended | $80,000 |
| To money received | $80,000 |
| To interest | $80,000 |

(Endorsed:) Filed June 1, 1877. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 28th day of June, A. D. 1879, in the adjourned May term of said court in the record of the proceedings thereof in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

PEOPLE'S BANK OF BELLEVILLE
*vs.*
MANUFACTURERS' NATIONAL BANK OF CHICAGO. } Assumpsit.

Now come the parties by their attorneys, and upon issue joined by agreement of the parties as per stipulation filed, they waive the intervention of a jury and for trial put themselves upon the court, and after hearing a part of the evidence by agreement it is ordered that
39 the further trial of the cause is postponed to a future day.

Afterwards, to wit, on the 1st day of July, A. D. 1879, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

PEOPLE'S BANK OF BELLEVILLE
*v.*
THE MANUFACTURERS' NATIONAL BANK OF CHICAGO. } Assumpsit.

Now comes the plaintiff by George W. Smith, esq., its attorney, and on his motion it is ordered that the plea filed herein stand to the amended count as well as to the original declaration, and the parties having no further evidence to introduce submit the cause to the court upon briefs to be furnished, and the court takes the same under advisement.

Afterwards, to wit, on the 18th day of July, A. D. 1879, in the July term of said court, in the record of the proceedings thereof, in said entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE PEOPLE'S BANK OF BELLEVILLE
*v.*
THE MANUFACTURERS' NATIONAL BANK OF CHICAGO. } Assumpsit.

40 Now come the parties by their attorneys, and the court having considered and being now fully advised upon the matters heretofore submitted herein, finds the issue for the defendant, and on motion of the defendant, by its attorney, for judgment herein, it is thereupon considered and adjudged by the court that the defendant do have and recover of the plaintiff its costs and charges about its defence in this behalf expended, amounting to the sum of thirty-five dollars and fifteen cents, and that it have execution therefor.

And on the same day, to wit, the 18th day of July, A. D. 1879, on the trial of said entitled cause, the following exceptions were taken and allowed by the court, and made of record in said entitled cause, to wit:

*Bill of exceptions.*

UNITED STATES OF AMERICA,
*Northern District of Illinois:*

THE PEOPLE'S BANK OF BELLEVILLE
*vs.*
THE MANUFCTURERS' NATIONAL BANK. } Assumpsit.

Be it remembered, that upon the trial of this cause the following proceedings were had, to wit:

And now, on this 18th day of July, A. D. 1879, come the said
41 parties by their respective attorneys, and this cause coming on to be tried, the issues of facts are submitted to the court without the intervention of a jury; whereupon the court hears the evidence and, being fully advised in the premises, finds as a special finding herein, as follows:

That on the 5th day of August, A. D. 1873, one Henry E. Pickett made his ten promissory notes of that date, each for $5,000, all payable to his own order, by him endorsed, and bearing interest from date at the rate of ten per cent. per annum, payable semi-annually, and payable one year from their date, eight of which notes are described in the declaration herein, and delivered them to defendant to be negotiated to plaintiff, in pursuance of a prior agreement between Pickett and defendant, that defendant should so negotiate said notes and apply the money arising therefrom to the cancellation of other indebtedness then due from Pickett to defendant.

That on the 8th day of August, A. D. 1873, one M. D. Buchanan, then vice president, and one of the directors of defendant, with the knowledge and consent of the president and cashier of defendant, who were also directors of said bank, but without any authority of the board of directors, as a board, or of a majority of them individually, or any notification by the board of directors, as a board, transmitted the
42 said notes to plaintiff, with a letter, a copy of which is attached to the declaration, and in which occurs the following language:

In accordance with your telegram, I herewith hand you 10 notes of $5,000 each.

HENRY E. PICKETT.

Dated August 5th, 1873.

10 per cent. semi-annually, $50,000.
We debit your account, $50,000.

This bank hereby guarantees the prompt payment of the principal sum and interest at maturity of said notes.

This letter was written on one of defendant's letter-heads and signed "M. D. Buchanan, vice-president." The notes were all endorsed, "Henry E. Pickett," and below "M. D. Buchanan, vice-president Manufacturers' National Bank," as shown by the copies attached to the declaration. The defendant was plaintiff's correspondent at Chicago, and plaintiff's account with defendant was debited July 5th, 1873, with $50,000 on account of said notes. When the plaintiff's account was so debited, Pickett's paper in defendant's hand was cancelled to the same amount.

That the said notes were all duly protested for non-payment at their maturity, and notice thereof given to defendant, and none of them,

nor any part of them, or either of them, principal or interest, have ever been paid.

And thereupon the court found the law to be with the defend-
43 ant. It is therefore considered and adjudged by the court that the defendant have and recover of the plaintiff its proper costs herein to be taxed, and that execution be awarded therefor.

And now, on the 18th day of July, A. D. 1879, come again the parties, and on motion of plaintiff, a writ of error is allowed in this case from the Supreme Court of the United States upon plaintiff entering into bond by July 28, 1879, in the penal sum of five hundred dollars conditioned according to law.

And thereupon the court found the issues of law to be with the defendant, and that the defendant was and is not in any manner liable to pay said notes, and to this finding of the court the plaintiff at the time excepted.

The foregoing being all the facts in the case, the plaintiff excepts to the conclusion of law by the court on said facts.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 18, 1879. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 26th day of July, A. D. 1879, said plaintiff, by its attorneys, filed in said clerk's office its bond in said entitled cause, which said bond is in the words and figures following, to wit:

44 *Bond.*

Supreme Court of the United States.

THE PEOPLE'S BANK OF BELLEVILLE
*vs.*
THE MANUFACTURERS' NATIONAL BANK OF Chicago. } Assumpsit.

Know all men by these presents that we, The People's Bank of Belleville, as principal, and Charles W. Thomas, Sebastian Fietsam, F. H. Pieper and Albert G. Badgley, as sureties, are held and firmly bound unto The Manufacturers' National Bank of Chicago in the penal sum of five hundred dollars, to be paid to the said Manufacturers' National Bank of Chicago, its assigns or legal representatives, to the payment of which, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this twenty-second day of July, A. D. 1879.

Whereas the above-named People's Bank of Belleville hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named People's Bank of Belleville shall prosecute its
45 said writ of error with effect, and answer all costs if it shall fail

to make good its plea, then this obligation shall be void; otherwise to be and remain in full force and virtue.

[SEAL.] THE PEOPLE'S BANK OF BELLEVILLE,
By SEBASTIAN FIETSAM, *its President.*
CHARLES W. THOMAS. [SEAL.]
SEBASTIAN FIETSAM. [SEAL.]
F. H. PIEPER. [SEAL.]
A. G. BADGLEY. [SEAL.]

Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 26, 1879. Wm. H. Bradley, cl'k.

46 NORTHERN DISTRICT OF ILLINOIS, *sct:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be correct and complete transcript of the record of all the proceedings had in said court in the cause wherein The People's Bank of Belleville is the plaintiff, and The Manufacturers' National Bank of Chicago is the defendant, as the same appears from the files and records of said court, now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, this 30th day of August, A. D. 1879, and of our Independence the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

47 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

To the Manufacturers' National Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. 1879, pursuant to an writ of error filed in the clerk's office of the circuit court of the United States, for the northern district of Illinois, wherein The People's Bank of Belleville is plaintiff in error, to show cause, if any there be, why the error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. H. W. Blodgett, this 28th day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

H. W. BLODGETT, *Judge.*

48 (Indorsed:) Supreme Court of the United States. People's Bank of Belleville vs. Manufacturers' Nat. Bank. Citation to October term, A. D. 1879.

CHICAGO, *July 28th*, 1879.

We hereby accept services of the within citation and enter our appearance for the defendant in error.

GARDNER & SCHUYLER,
*Att'ys for Def't in Error.*

49 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

The United States of America to the judges of the circuit court of the United States, for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a

judgment in a plea which is before you in said circuit court, between the People's Bank of Belleville and the Manufacturers' National Bank of Chicago, in an action of assumpsit, a manifest error hath happened to the great damage of the said The People's Bank of Belleville, as by its complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1879, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk*.

50 (Indorsed:) Supreme Court of the United States. People's Bank of Belleville vs. Manufacturers' National Bank of Chicago. Writ of error.

(Indorsement on cover:) No. 873. The People's Bank of Belleville, plaintiff in error, vs. The Manufacturers' National Bank of Chicago. N. Illinois C. C. U. S. Filed 2nd October, 1879.

REC. 873—3

No. _____

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1879.

THE PEOPLE'S BANK OF BELLEVILLE,
PLAINTIFF IN ERROR,

v.

THE MANUFACTURERS' NATIONAL BANK OF CHICAGO,
DEFENDANT IN ERROR.

## STATEMENT AND BRIEF

ON BEHALF OF PLAINTIFF IN ERROR.

CHARLES W. THOMAS,
Counsel for Plaintiff in Error.

CHICAGO:
Reach, Barnard & Co., Legal Printers, 104 Randolph Street.
1879.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, A. D. 1879.

THE PEOPLE'S BANK OF BELLEVILLE,
PLAINTIFF IN ERROR,
*v.*
THE MANUFACTURERS' NATIONAL BANK OF CHICAGO,
DEFENDANT IN ERROR.

## STATEMENT.

This is an action to recover upon the guaranty of eight promissory notes, made by Henry E. Picket, dated August 5, 1873, for the sum of $5,000 each, payable to his own order one year after date, with ten per cent. interest, and by him endorsed, and guaranteed by defendant. The declaration contains special counts on the guaranties and the common counts. The pleas are, the general issue sworn to, and a sworn plea that the defendant did not execute the guaranty. The facts are as follows:

In August, 1873, Picket was heavily indebted to defendant. The plaintiff at that time had a large amount of money to its credit on defendant's books, some portion of which it was seeking to loan. By letter and telegraph to

defendant, it agreed to a loan of $50,000, upon the paper of Picket, guaranteed by the defendant. The defendant then procured Picket to make the notes, in suit here, and to deliver them to it. They were not discounted by defendant, but were endorsed by the defendant, and were transmitted to plaintiff in a letter, of which the following is a copy:

THE MANUFACTURERS' NATIONAL BANK.

CHICAGO, ILL., Aug. 8, 1873.

A. G. BADGLEY, ESQ., Cashier, Belleville, Ills.

*Dear Sir:* In accordance with your telegram of this date, I herewith hand you 10 notes of $5,000 each, Henry E. Picket, dated 5 Aug., 1873, 10 per cent., semi-annually..... $50,000

We debit your account..... $50,000

This bank hereby guarantees the prompt payment of the principal sum and interest at maturity, of said notes.

The trust deed securing said notes has been filed for record, and as soon as recorded, I will forward same to you.

Please return to me note of Sherman,.....$15,000 enclosed in our letter of 6th instant, and we will credit same in your account.

Very respectfully.

M. D. BUCHANAN, *Vice Pres't.*

## ASSIGNMENT OF ERRORS.

Upon the record and proceedings aforesaid, the plaintiff in error, The Peoples' Bank of Belleville, assigns for error the following:

I. The Circuit Court of the United States erred in assuming jurisdiction of said cause, and trying the same.

II. The said Court erred in rendering judgment against plaintiff there for costs.

III. The said Court erred in not rendering judgment in favor of plaintiff upon the facts found in the special finding, for the amount of the notes therein mentioned, with interest according to their tenor and effect.

IV. The Circuit Court erred in finding as a matter of law defendant was not liable.

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## POINTS.

### I.

The first question presented here is, whether a national bank has any power to guarantee promissory notes in this State, under circumstances such as exist in this case.

The eighth section of the Act of Congress concerning National Banks, authorizes associations formed under it to exercise *all* such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt.

In the case of *Shinkle* v. *First National Bank of Ripley*, 22 Ohio St., 516, the Supreme Court of Ohio, having occasion to discuss the meaning of this section, used the following language:

"As we construe section 8 of the Act of Congress of "1864, it expressly gives *all* such necessary incidental "powers, without limitation, as to the particular modes in "which they are to be exercised. The words, 'by dis- "counting promissory notes, drafts, bills of exchange,' etc., "contained in that section, are not to be read as limiting "the modes of exercising the incidental powers granted, "but as limiting and defining the kind of banking which "is authorized by the act. In other words, the association "is authorized by section 8 to carry on 'banking' by dis- "counting and negotiating promissory notes, drafts, bills "of exchange, etc., and to exercise *all* such incidental "powers as shall be necessary for that purpose."

The word "negotiate" in mercantile law, means to put in circulation, to pass in the way of business. *Worcester's Dictionary, sub verbo.* Bouvier L. Dic. under "*Negotia-* "*tion.*" One of the well recognized methods of negotiating a promissory note in this State is, by guaranteeing it. *Camden* v. *McKay*, 3 Scam., 437; *Webster* v. *Cobb*, 17 Ill., 459; *Blatchford* v. *Milliken*, 35 Ill., 434; and numerous cases there referred to. The National Banks have, by express provision of the statute, *all* incidental powers necessary to negotiate paper, and one of those powers in the State of Illinois, is undoubtedly the power to guarantee. In this case there can be no doubt that, without defendant's guaranty, these notes could not have been negotiated, and that credit was extended to it only, so that the incidental power exercised here was necessary to complete their negotiation. It seems clear, then, that if the section alluded to is to receive the construction put upon it by the Supreme Court of Ohio, there was no limitation placed upon any method or mode of negotiating this paper which the defendant might deem necessary to insure its sale, and the method chosen was within the express power granted by the statute, and one recognized by the law of Illinois.

II.

The doctrine of "indorsement" or "assignment" of negotiable instruments as it exists in Illinois, is neither of general nor universal application.

It has its origin in the statute, which is founded upon the Virginia statute.

The law merchant as known in England until the statute of Anne, applied only to bills of exchange. That statute extended its operation to promissory notes.

And under its application an endorser becomes liable upon protest and due notice.

The statute of Illinois is so far a departure as to make an indorser liable only after suit brought against the maker, or in case of his insolvency.

Under the statute of Illinois, a "guaranty" is an act as legitimate as an "indorsement." In practice, and among bankers, it is rare that reliance is placed upon an "indorsement."

"It is the settled law of this State that a person who is "not a party to a promissory note which is to become a "valid obligation against the maker upon its delivery to "the payee, by writing his name in blank upon the back "of the note, is presumed to amount to the obligation of a "guarantor."

*Blatchford* v. *Milliken*, 35 Ill., 434.

It cannot, therefore, justly be said that in Illinois an "indorsement" is in any wise more in accord with custom or the usual course of business than a "guaranty."

The power to negotiate by "endorsement" embraces in its scope the power to negotiate by "guaranty."

An "indorsement" is a "guaranty." It is an agreement to become liable in the event of contingencies, which are beyond the control of the indorser as "the insolvency

" of the maker," or " absence from the jurisdiction at the " maturity of the note."

## III.

But the principle of estoppel may be invoked by plaintiff to prevent the defendant from denying in this case its power to guarantee these notes. This court in the case of *Merchant's Bank* v. *State Bank*, 10 Wall., 644, said: " If " the contract can be valid under any circumstances, an in- " nocent party in such case has the right to presume their " existence, and the corporation is estopped to deny them. " * * * The principle has become axiomatic " in the law of corporations, and by no tribunal has it " been applied with more firmness and vigor than by this " court." And, " a private corporation will be estopped " to set up the defense of *ultra vires* in respect to all acts " and contracts within the apparent scope of its powers." Bigelow on Estoppel, p. 423. In the [redacted] case of *National Bank* v. *Mathews*, 98 U. S., 621, this court decided that inasmuch as there was no express provision of the National Banking Act, forbidding National Banks to take real estate security, the question of authority to take such security could only arise in a direct proceeding brought by Government. We contend that the principle announced in that case governs this, and that the numerous authorities cited by the court there, all support plaintiff's position here, that the defendant cannot raise in this case, where it got the benefit of the transaction, the question of *ultra vires*. That the guaranty, being within the apparent scope of its power, that is, not in express terms prohibited by its charter, the question whether it was *ultra vires* can only come up in a direct proceeding brought to inquire whether the act was within the powers granted by the Act of Congress. The defendant cannot take advan-

tage of its own alleged lack of power to repudiate a contract of which it has received all the benefit.

## IV.

It may be said that if it is conceded that the defendant had power to guarantee the paper, the particular officer or agent who wrote the guaranty had no power given him by the defendant to do the act. It is not necessary to review the evidence, as to the power which Buchanan, the Vice-President, may have originally had, or lacked, to make the guaranty sued on, for there is the fullest and clearest ratification, by the defendant, of all the acts of Buchanan.

A principal who reaps the benefit of the unauthorized act of his agent, thereby ratifies the act. (Wharton Agency Sec. 89.) "Corporations, as much as individuals, are bound "to good faith, and fair dealing, and the rule is well settled "that they cannot, by their acts, representations or silence, "involve others in erroneous engagements, and then turn "round and disavow their acts, and defeat the just expec- "tations which their own conduct has superinduced." (*Railroad Co.* v. *Howard*, 7 Wall., 392.) An instructive case upon this point is that of *Kelsey* v. *The National Bank of Crawford Co.*, 69 Penn. St. R., 426. There the cashier of the bank, without due authority, offered a large reward for the arrest of a thief who had stolen the bank's money. Plaintiff, relying upon the offer, arrested the thief, and recovered most of the stolen property. The bank refused to pay the reward, and plaintiff sued. The defense was that the cashier had no power or authority to offer the reward. The court, in discussing the matter, says:

"It is not necessary to decide whether the cashier *ex* "*officio* had authority to offer the reward in question for "the detection of the thieves that robbed the bank. If he

" had no authority the bank is liable for the reward, if the " offer was acquiesced in and ratified by the directors. " The law is well settled that a principal who neglects " promptly to disavow an act of his agent, by which the " latter transcended his authority, makes the act his own " (*Bredin* v. *Dubarry*, 14 S. & R., 30) ; and the maxim " which makes ratification equivalent to a precedent au- " thority, is as much predicable of ratification by a cor- " poration as it is of ratification by any other principal, and " it is equally to be presumed from the absence of dissent. " (*Gordon* v. *Preston*, 1 Watts, 387.)"

The law upon this point of ratification seems to be so well settled that it is not necessary to multiply the authorities which exist in abundance.

But this loan was in effect made to defendant, and for its benefit, and there ought to be a recovery upon the common counts for money had and received. Picket made the notes in suit payable to his own order, and having endorsed them, delivered them to defendant. The arrangement was made to enable the defendant to borrow money, and when the plaintiff took the notes, it charged plaintiff's account with the money so raised. Picket made the indebtedness in such shape that defendant could borrow money upon it. The transaction was in effect a loan of money by plaintiff to defendant, and no question of *ultra vires* or agency arises. This is not a case where notes were regularly discounted and regularly disposed of in the course of business. What was received for them went directly to the defendant, and inured to its benefit.

CHARLES W. THOMAS,
*For Plaintiff in Error.*

APPELLEES' LABEL.

Strong

S. C. U. S.
No. 112 Oct. Term 1879.

Amoskeag Company
v
Trainor & Sons.

Supplement to Appellant's Brief.

1. There can be no acquiescence without knowledge, and burthen of proof of knowledge is on him who alleges acquiescence.

Weldon v Dicks L. R. 10 Ch. Div. 247.

2. On the main question, see:—

Robinson v Findlay L. R. 9 Ch. Div. 487
Weldon v Dicks L. R. 10 Ch. Div. 247.
Metzler v Wood L. R. 8 Ch. Div. 606.

Sheppard v Stuart 2 pages following.

The monthly settlement of accounts was analogous to the renewal of an old note tainted with usury. In such cases it has been always held that the usury will taint the new note also.

Campbell *v.* Swan, *supra*.

Bly *v.* Second National Bank, 29 P. F. Smith, 457.

The fact of the Farmers and Mechanics' Bank charging an illegal rate for discounting notes, cannot preclude defendants from defalking against plaintiffs the illegal interest charged by it on the discount of the same notes.

May 26, 1879. THE COURT. We have examined with care the several errors assigned in this case. It is unnecessary to discuss them separately. A statement of the principle upon which the cause turned will show, we think, that no error was committed by the learned Court in their rulings and charge to the jury. Though the action was nominally on a promissory note given by the defendants, yet, as it was expressed on its face that it was to be held as collateral by the plaintiffs for the payment of any overdrafts by the Farmers and Mechanics' Bank of Shippensburg, it was actually a suit to recover those overdrafts, against the defendants as sureties. It cannot be disputed that the defendants would be entitled to the benefit of whatever defence would be available to the Farmers and Mechanics' Bank. The plaintiffs, being a national bank, by charging more than six per cent. interest on these overdrafts, lost the right to recover any interest at all. The point, then, does the Act of Congress forfeit interest beyond the maturity of the note sued on, does not arise. No recovery was had on the note; it was evidence merely of the obligation of the defendants to meet and answer the liability of the Farmers and Mechanics' Bank on the overdrafts. Admitting that the monthly accounts were stated accounts, that certainly never has been held to preclude a defendant from setting up an illegal charge of usury. Nor can the fact that the Farmers and Mechanics' Bank charged illegal interest to their customers on the notes discounted for them by the plaintiffs affect their right to set up, against the plaintiffs, their violation of the Act of Congress, under which alone they have any right to do business at all.

Judgment affirmed.

PER CURIAM. PAXSON, WOODWARD, and STERRETT, JJ., absent.

# Common Pleas—Equity.

C. P. No. 3. May 10, 1879.

## Sheppard et al. v. Stuart et al.

*Trade-marks—Equitable jurisdiction of State courts to enjoin infringement of—Use of the word Excelsior as applied to a specific article—Previous use of the word by other parties—In what way a device must indicate "true origin or ownership"—Ferguson v. Davol Mills, 7 Phila. 256, considered—What is abandonment—Customs of trade—Laches.*

Motion to continue preliminary injunction.

Hearing on bill, answer and affidavits.

The bill, filed by Isaac A. Sheppard & Co. against Stuart, Peterson & Co. alleged that the complainants, as manufacturers of stoves and ranges, had been accustomed for many years to place the word "Excelsior" on a certain kind of range made by them, which word, as placed on such ranges, the complainants claim, by continuous use, came to be a trade-mark. In 1864, the complainants first began to manufacture these ranges; they advertised extensively, and it came into general use. Parties advertising houses for sale would name the Excelsior range as one of the conveniencies; over 40,000 were sold in fifteen years. In 1877, they alleged, the defendants made ranges having similar characteristics, and placed upon them the words "New Excelsior" and "Improved Excelsior," thereby intending to deceive purchasers. The bill also alleged that the defendants have placed the words "Excelsior ranges" on their sign, and have advertised that they have "Excelsior" ranges of different kinds and sizes, and make the plates and pieces for all "Excelsior" ranges. All of which is a cause of injury to the business of the complainants. The bill prayed an injunction and account.

The defendants answered that the word "Excelsior" had been used to designate a stove manufactured in Philadelphia long before 1864, and that it was also used by a firm in Troy, N. Y., as the name of a range very similar to the one manufactured by complainants, and therefore it could not be used as a trade-mark by Isaac A. Sheppard & Co. The defendants denied that by using the words "New Excelsior" and "Improved Excelsior," they intended to deceive the public; and they also further answered that there were no special marks of similarity between their ranges and the ranges manufactured by complainants. As to manufacturing plates and pieces to fit all "Excelsior" ranges, the defendants disclaim any intention to infringe upon

the complainants' rights. They make plates and pieces to fit all ranges. The defendants allege that even if the complainants ever had a right to the use of the word "Excelsior" as a trade-mark, they lost it by abandonment, *i. e.*, by allowing certain dealers who sell these ranges to place their own names on plaintiffs' "Excelsior" ranges.

Numerous affidavits were read by both sides, many of which were conflicting.

*Leonard Myers*, for the rule.

The affidavits show that there was no other range of any description manufactured in or near Philadelphia called the "Excelsior" until Stuart, Peterson & Co. began to manufacture them in 1877, and no range of the kind having this mark was made elsewhere. The plaintiffs had used the word continuously for fifteen years, and by so doing they gained a trade-mark in the word as applied to their ranges.

Browne's Law of Trade-marks, §§ 611–13.
Cox's American Trade-mark Cases, § 674.
Filley *v.* Fassett, 44 Mo. 173.
Rowley *v.* Houghton, 2 Brew. 303.
Wortherspoon *v.* Currie, 23 Law Times Rep. 443.
Ford *v.* Foster, 7 Ch. App. Cases, 611.

The word "Excelsior" served to designate complainants' manufacture as effectually as names ever serve to distinguish things. The public associated it with the article on which it was placed, and this is the true index of "origin and ownership" within the meaning of trade-mark law.

Del. & Hudson Canal Co. *v.* Clark, 13 Wall. 311.
Wamsutta Mills *v.* Allen *et al.*, 6 WEEKLY NOTES, 189.
Fertilizer Co. *v.* Woodside, 1 Hughes, 115.
Browne's Law of Trade-marks, § 190.

The fact that complainants have other ranges with different names should not prevent them from being protected in the use of this.

Colman *v.* Crump, 70 N. Y. 573.

Where a manufacturer has habitually stamped his goods with a peculiar mark or brand, a court of equity will restrain another party from adopting it for the same kind of goods, especially where the sale of the manufactured articles was confined to a particular section of the country.

Corwin *v.* Daly, 7 Bosw. 222.
McLean *v.* Fleming, 6 Otto, 245.
Colman *v.* Crump, *supra.*
Coddington's Digest of Trade-marks, § 1059.

But suppose plaintiffs had allowed others to use this trade-mark on goods of their *own make* (which is not even asserted), the consent of a manufacturer to the use or imitation of his trade-mark by another may perhaps be justly inferred from his knowledge and silence, but such a consent whether express or implied when purely gratuitous may certainly be withdrawn, and when implied it lasts no longer than the silence from which it springs. It is in reality no more than a revocable license, and does not destroy the owner's exclusive rights.

Amoskeag Co. *v.* Spear, 2 Sandf. 599.
Lockwood *v.* Bostwick, 2 Daly, 521.
McCardel *v.* Peck, 28 How. Pr. Rep. 120.
Coddington on Trade-marks, 441, § 1184.
Winsor *v.* Clyde, 9 Phila. 513.
Newman *v.* Alvord, 51 N. Y. 189.
Lee *v.* Harley, 5 Ch. App. Cases, Law R. 155.

*George W. Thorn* (with him *Preston K. Erdman*), contra.

The plaintiffs had no right to the exclusive use of the word "Excelsior," as it had been used long before by manufacturers of stoves and ranges.

Cox's Trade-mark Cases, §§ 194, 226.
Fetridge *v.* Merchant, 4 Abb. Pr Rep. 150.
Wolfe *v.* Goulard, 18 How. Pr. Rep. 64.
Stokes *v.* Landgraff, 17 Barb. 608.

The word "Excelsior," as used by the complainants, is not a trade-mark, but a fancy name used to indicate a particular kind of a stove; it does not indicate origin or ownership.

Cox's Trade-mark Cases, § 608.
Ferguson *v.* Davol Mills, 2 Brews. 314.
Del. & Hudson Canal Co. *v.* Clark, 13 Wall. 311.
Stokes *v.* Landgraff, *supra.*

The plaintiffs, by their long delay in bringing this bill, and by allowing others to affix their names upon plaintiffs' "Excelsior" ranges, have lost any equitable rights that they otherwise might have had.

Kerr on Injunctions, § 205.
Cox's Trade-mark Cases, § 717.
Isaacson *v.* Thompson, 20 Weekly Rep. 196.
Amoskeag Co. *v.* Garner, 55 Barb. 151.
Flavel *v.* Harrison, 17 Jurist, 368.

C. A. V.

June 3, 1879. THE COURT (after stating the facts). The defendants deny that the use of the words "New Excelsior" and "Improved Excelsior" is either intended or calculated to deceive the public or to induce them to purchase as and for the ranges of the plaintiffs. It may be that the defendants did not intend to deceive the public; but it can scarcely be said that these devices were not calculated to do so. What other idea is suggested by the words "New Excelsior" and "Improved Excelsior," than that a newer improved "Excelsior" is made? It can be neither a "New Excelsior" nor an "Improved Excelsior," without suggesting an important and valuable change in the old "Excelsior." Of what use can these names be unless they call to mind the old "Excelsior?" And of what use would that be unless it also recalled the usefulness and popularity of the old? It should not be forgotten in this connection that the defendants say their "object was simply to produce a light cheap range which could be sold in competition with the cheap range of the plaintiffs."

If this were otherwise it may not be said that the assumption of the name "Excelsior" was not

calculated to deceive the public and injure the plaintiffs. It may be that the defendants did not intend to injure the plaintiffs; but if their conduct produced injury, they must be held to have intended that injury. In Hine *v.* Lart (10 Jur. 106), it was held, refusing a motion to dissolve an injunction, that defendants having made so complete a copy of plaintiffs' mark, must be taken to have done so with an intent to gain an advantage to which they were not entitled. Judge PAXSON, in Dixon Co. *v.* Guggenheim (7 Phila. R. 408), cites English cases which held that "A man, though not intending an injury to another, should not be allowed to adopt the marks by which the goods of another are designated, if the effect of adopting them would be to prejudice the trade of such other person. It is not necessary to aver or prove wrongful intent on the part of another." If, therefore, the plaintiffs are entitled to use the word "Excelsior" as a trade-mark, it would follow that the defendants should be enjoined.

The defendants contend that the plaintiffs are not entitled to claim the word "Excelsior" as applied to their ranges as a trade-mark, because: (1) Hicks, Wolf & Co., of Troy, New York, have used the same word upon flat top ranges since 1861 continuously. (2) The word is a fancy title for stoves of various kinds in the trade generally. (3) Orr, Painter & Co. made and sold similar ranges with the word "Excelsior" upon them. (4) The ranges of defendants have improvements. (5) That defendants' ranges are different. (6) The word Excelsior as used by plaintiffs does not indicate that they are owners of the ranges. (7) The plaintiffs have placed other names upon some of their ranges. (8) The plaintiffs have put the names of buyers upon the ranges in near connection with the word "Excelsior," and have thereby abandoned the word to general use. (9) Defendants have been making them for two years, and the plaintiffs did not forbid them until about a year ago.

The first and second reasons may be disposed of by the remark that the evidence shows that the ranges referred to were not the same as plaintiffs'. The plaintiffs do not claim property in the word "Excelsior." Their claim is that they have first appropriated that word to a specific article of their manufacture.

To the third it may be said that it does not appear that plaintiffs permitted or acquiesced in the use of the word Excelsior by Orr, Painter & Co.; or that they knew of such use of it as would imply acquiescence or permission.

It is perhaps sufficient to say that no improvement in the range or difference in appearance would justify the defendants in the use of the word "Excelsior." If the improvements and changes make a different kind of range they would have the right. But the improvements and changes have not substantially altered the character and appearance of defendants' ranges from that of the plaintiffs'.

It is also contended that the word "Excelsior," as used by the plaintiffs, is not a trade-mark, but a fancy name to indicate a particular kind of stove, because it does not indicate origin or ownership. To sustain this position many authorities were cited, but that which was most relied upon was Ferguson *v.* Davol Mills (7 Phil. 256), in which ALLISON, P. J., says: "The simplest case of a trade-mark is the name and address of the claimant, and it is absolutely requisite that a device or symbol should perform the office of a finger board; should indicate the name and address of the manufacturer to invest it with the attribute and entitle it to the protection of a trade-mark." This language is clear, vigorous and decisive; and there can be no doubt that the cause was determined upon this principle alone. It will be seen from an examination of the authorities cited by the learned Judge, that he is not fully sustained by them in this advanced position. They affirm only that a trade-mark should indicate the "true origin or ownership of the article offered for sale." The learned Judge was justified, perhaps, in thus giving a sensible form to what was before a meaningless phrase, adopted and continued in almost every trade-mark case without necessity, without application to the cases, and without definition or explanation.

In the Dixon Co. *v.* Guggenheim (7 Phila. 408), Judge PAXSON adopts as "well sustained by reason and authority," the doctrine of "true origin or ownership." In justice to him it should be observed that it was not raised in the case before him, and his attention was not directed to its full import. In his very able and carefully prepared opinion he cites the decisions which declared "Revere House," "New York Hotel," "The Captain's Live and Let Live Oyster and Dining Rooms," to be trade-marks. He also says: "The name of a newspaper is a trade-mark;" and with proper judicial indignation, adds: "Can it be supposed that if some one were to commence the publication in this city of a 'Public Ledger' of the same size, price and style as the one published by Mr. George W. Childs, that a Court of Equity, upon a proper application, would not promptly arrest the career of such a piratical craft by an injunction?" And yet neither of these words indicate "origin or ownership."

It is not now important to ascertain how and where this doctrine originated. It has been followed as an axiom. And yet to the thoughtful it must always have been a perplexing enigma.

It is submitted that in neither of the cases cited by Judge ALLISON is the question of "true origin

and ownership" raised, or discussed, or defined. The question raised and decided was that words which designated the article itself, or its attributes, were not trade-marks. This is so in all the cases which we have been able to examine. As illustrative of all we may take the language of C. J. DUER in Amoskeag Co. *v.* Spear (2 Sand. S. C. R. 599): "A mark can only be protected as a trade-mark when it is used merely as indicating the true origin and ownership of the article offered for sale; never when it is used to designate the article itself." We may be allowed in this connection to say that we have not been able to find any case except Ferguson *v.* Davol Mills, in which the doctrine of "true origin or ownership" is distinctively avowed.

It might, perhaps, be useful at this stage to ascertain what a trade-mark is, and what it indicates. In Stokes *v.* Landgraff (17 Barb. 608), STRONG, J., says: "The principle is well settled that a manufacturer may, by priority of appropriation of names, letters, marks, or symbols of any kind to distinguish his manufacture, acquire a property therein, as a trade-mark."

"The right of trade-mark is said to be best termed an exclusive right arising from first use." (Bouvier.)

"The rule sometimes laid down on this subject is: that if a name, sign, mark, brand, label, word, or device of any kind, can be advantageously used to designate the goods, property, or particular place of business of a person engaged in trade, manufacture, or any similar business, he may adopt and use such as he pleases, which have not before been appropriated." (Story's Equity, § 951.)

"The physiology of the thing called a trade-mark must be examined and carefully analyzed. It has an individuality of nature. Meaningless in itself, when placed in a certain juxtaposition, it involves an idea. It virtually says that the vendible object to which it is attached is the workmanship or the selected article of the owner of the mark. It is intended to strike the eye, and sometimes the ear by its sound when spoken of, and thus excite inquiry. It should possess such salient features as might at once arrest attention, and put the intended purchaser on the alert." (Browne on the Law of Trade-mark, § 88.)

In the Amoskeag Manuf. Co. *v.* Spear, Chief Justice DUER says: "Every manufacturer has an undoubted right to distinguish his goods by a peculiar mark or device, in order that they may be known to be his."

How is a mark or device to indicate "true origin or ownership;" or to indicate the name and address of the manufacturer? In and by itself alone this is impossible. It is only by use as the device of him who distinguishes his goods by it in order that they may be known as his, that it can ever indicate "true origin or ownership."

In Allegheny Fertilizer Company *v.* Woodside (1 Hughes, 115), GILES, J., says: "But it is argued that the name adopted ('Eureka') did not sufficiently indicate 'origin or ownership' to be regarded as a trade-mark. This was a mistake. It served to distinguish the complainant's manufacture quite as effectually as names ever serve to distinguish things."

In the Meriden Britannia Co. *v.* Parker (39 Conn. 450), the trade-mark consisted of the words "1847, Rogers Bros., A 1." The Rogers Bros. were superintendents of the petitioners. The respondents contended that the said trade-mark did not indicate the true origin of the goods: *Held*, that the representation that the Rogers Bros. were the manufacturers was true in a certain sense, but that the petitioners were in another sense the manufacturers. "Like all other symbols and devices used as trade-marks its import was not at first perhaps fully understood. The effect as well as the value of a trade-mark is the work of time and expense. This probably was no exception to the rule. However this may be it seems to have been well understood by the trade at the date of this petition, that goods bearing that stamp were manufactured by the petitioners:" *Held*, that the trade-mark sufficiently indicated the origin and ownership of the goods.

In the Delaware and Hudson Canal Co. *v.* Clark (13 Wallace, 311), STRONG, J., says: "Hence the trade-mark must either by itself or by association point distinctly to the origin or ownership of the articles to which it is applied. The first appropriator of a name or a device pointing to his ownership, or which by being associated with articles of trade has acquired an understood reference to the originator or manufacturer of the articles, is injured whenever another adopts the same name for similar articles."

In other words, the evidence must show the first appropriation of the device by the claimant; its application by him to his goods or business; and that the trade or public recognize the article or business by that device as made or sold by him, or belonging to him. In no other way can a mark or device indicate "true origin or ownership."

The evidence in this case is conclusive that the plaintiffs first appropriated the word "Excelsior" to a specific article of their manufacture; that they have continuously used it for the last fifteen years, during which time they have made and sold more than forty thousand; that the whole trade recognized them as the makers of the articles to which the word "Excelsior" was attached. This device therefore pointed out the

"true origin and ownership" of the goods, and thereby became a trade-mark.

It would be useless to waste time in collating the single and collective words and devices which have been held as trade-marks. The word "Excelsior" alone has been repeatedly held to be a good trade-mark. In Winsor *v.* Clyde (9 Phil. 513; affirmed by the Supreme Court), "Keystone Line" was held to be a good trade-mark.

It is further contended that inasmuch as the plaintiffs, at the request of a few purchasers, placed another name upon a few of their ranges, and erased the word "Excelsior," they thereby abandoned their right to the use of the word as a trade-mark. These instances can only be regarded as special contracts for the goods without the trade-mark. They can in no sense be regarded as a representation to the public of the abandonment of the trade-mark and the adoption of another. It is the purchaser who changes the name, and it is nowhere held that the purchaser of an article protected by a trade-mark is bound to maintain the name upon the article. He buys for use and consumption, and may retain the mark or not as he pleases.

The province of a trade-mark is to bring seller and buyer together, that the one may sell his merchandise, and the other obtain the particular goods the reputation of which has won his confidence. When this is done the office and object of the trade-mark is accomplished. The seller has no longer any control over or interest in the article. It belongs wholly to the purchaser, and with it the incident, the trade-mark. As he may consume or destroy, or alter or change the article, so may he its name. What he may do himself, he may do by another; what he may do by another he may do by the seller. If he can do this after purchase, he may certainly contract to have it done before purchase. This is a matter in which the general public can have no interest, and therefore have no interest or concern which should be considered. It in no way affects the usefulness of the article.

But why should it be held that the manufacturer must place the trade-mark upon all of his goods? He may prefer, for his own advantage and the protection of the public, to place it only upon his best, and leave the inferior nameless or give them another name. Honesty and fair dealing and his own interest would suggest this. And if this be done it should not be regarded as an abandonment.

The evidence discloses the fact that the plaintiffs in some cases when requested by dealers, placed the dealer's name upon the range in proximity to the word "Excelsior." It is shown, however, that this is a custom of the trade known to and acted upon by all dealers and manufacturers. It is proved that even when the names of dealers were thus placed upon the ranges, they were still known and recognized by the trade, dealers and manufacturers, as ranges made by the plaintiffs.

It is contended that this was permitting those dealers to hold themselves out as the manufacturers of such ranges, and was therefore an abandonment.

It must be observed that there is nothing in connection with the names of these dealers to indicate that they are the manufacturers, and there is no evidence that any one ever supposed they were the manufacturers. On the contrary, there is ample evidence even in the affidavits of the defendants, that they were still regarded as manufactured by the plaintiffs. Why then should we force the inference that these names indicated the names of the manufacturers, for the benefit of one who wrongfully appropriates to himself another's industry, enterprise and property.

In considering acts from which acquiescence or abandonment are or may be inferred, it should not be forgotten that a trade-mark is property. In all cases of litigation it may fairly be said to be valuable property. The man who lends his horse frequently, or permits another to use it, is never said to have abandoned his horse to the public, or to acquiesce in any claim to use the horse at pleasure. Much less can these acts justify the stranger who breaks into the stable and steals the horse.

What injury can arise from this practice? Who can be deceived or betrayed into any error or injury thereby? The public who buy for consumption have the article they expected and bargained for, with its name, the trade-mark upon it. They have in addition, as a further security, the name and endorsement of the dealer. They therefore have no cause of complaint, and the public who do not purchase have no right to complain. What is it to the man who does not buy, or want to buy, that these names may possibly indicate that the owners of the names have the right to manufacture the ranges?

Such acts do not denote abandonment. The owner of a store does no injury to his right of property in his store, or its contents, or his business, by permitting the names of some of his employés to be placed on the inside or outside of the building, as is customary in this city. The rights of property are not so easily frittered away.

It might be that acts like these might betray a person into a violation of the right of property in a trade-mark. If they did he would be excusable, but it would confer upon him no right to further use the mark against the protest of the owner. The defendants made no such pretence as this. They do not pretend that they were

induced to believe that plaintiff had conferred upon these dealers the right to manufacture the range and use the trade-mark. On the contrary, they have shown by their own evidence that they knew all about the matter, and that it was done in pursuance of a well-established custom of their trade. How can the probability that the public might believe these dealers to be the manufacturers with the right to use the trade-mark, give the defendants the right to use the trade-mark when they know the fact to be otherwise?

In considering a question of trade-mark the customs of trade should not be ignored. The true doctrine, perhaps, should be to consider it in the light and in aid of such customs. What the custom of trade allows the law should allow; for such customs must be for the general good as well as the good of the special trade. Commercial custom made a promise in writing to pay in thirty days a promise to pay in thirty-three days. It is suggested then that the custom, which the plaintiffs recognized, should not work a forfeiture, especially when no one was thereby betrayed into the belief that any one, other than the plaintiffs, had manufactured the articles.

An explanation of this custom may be found in the fact that the ranges as made both by the plaintiffs and defendants are not complete for use as they make and sell them. They are not ranges to the public or to the consumer until they are set up and encased in brick, as the movements of a watch are not a watch until encased. It is the dealer who makes them fit for use. It is his trade and business to build in the ranges. When the range is completed it is his manufacture. The plaintiffs and defendants have furnished him with only one of the component parts—one of the materials.

The manufacturer of the movements of a watch may have a trade-mark for his own work; it is or may be, so far as he is concerned, a completed work. Can it be said that he loses his right to that trade mark because he permits another manufacturer, whose business it is to extend his work to make it fit for use, to place his name upon the thing called a watch? Why then should it be said that the plaintiffs lose their right to their trade-mark for the article they furnish to the trade because they permit the dealer, who uses their article to furnish for the public a completed range, to place his name upon it.

To the plaintiffs and the defendants the dealers are the public. The evidence shows that they are the sole purchasers. And it also shows that no dealer or other person has been deceived by the dealer's name upon the ranges into believing that he was the manufacturer of the parts made by the plaintiffs. On the contrary the evidence of the respondents shows that even when such names are upon the ranges they are still recognized and regarded as the ranges of the plaintiffs.

It would therefore be stretching an inference to the bounds of probability to infer from such a license that plaintiffs had abandoned their right in the trade-mark to the community.

Even if we are altogether in error in all this, it will be observed that it is conceded that the exercise of this custom of the trade by the plaintiffs was simply a license. It needs no citation of authorities to show that a license is not an abandonment—not even evidence of abandonment. It is perhaps the highest evidence of the assertion of the right and acquiescence therein. This doctrine was recognized in Winsor *v.* Clyde (9 Phil. 513).

It has been strongly urged that the plaintiffs have lost their right of action by their delay in bringing suit, or in asserting their claim. It may be that even a wrong-doer may sometimes successfully defend upon this ground. It must, however, be such a delay as would lead a reasonable person to suppose that the owner had abandoned his device, or such as induced the defendants to act, or under such circumstances as required the owner to assert his right. Even in such cases the title in the trade-mark is not lost or deemed abandoned, but the owner is estopped from asserting it to prevent another from using the device. It is evident, therefore, that each case must be decided upon its own facts. There can be no fixed rule, and time is only a matter of evidence to be considered with all others. There is no evidence in this case that the defendants were encouraged or misled into their wrongful acts, or that the plaintiffs were silent when they were called upon to speak. The evidence shows that they moved with as much celerity as was consistent with a proper vindication of their right. The delay seems to have been no greater than was necessary for a prudent, careful preparation for the legal conflict.

The conclusions to which we have come are, that the plaintiffs have a right to the word Excelsior as a trade-mark; that the defendants have wrongfully used that trade-mark to the injury of the plaintiffs, and should be enjoined therefrom.

The motion to continue the special injunction is therefore allowed.

Opinion by FINLETTER, J.

[The Supreme Court of the United States decided, on Nov. 17, 1879, that the Acts of Congress relating to trade-marks are unconstitutional.]